

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-1371

SEP 14 1972

MICHAEL BODAK, JR., C

PEDRO J. ROSARIO, WILLIAM J. FREEDMAN and KAREN
LEE GOTTESMAN, individually and on behalf of all others
similarly situated,

Petitioners,

against

NELSON ROCKEFELLER, Governor of the State of New York,
JOHN P. LOMENZO, Secretary of State of The State of
New York, MAURICE J. O'ROURKE, JAMES M. POWER,
THOMAS MALLEE and J. J. DUBERSTEIN, consisting of the
BOARD OF ELECTIONS IN THE CITY OF NEW YORK,

Respondents.

STEVEN EISNER, on his own behalf and on behalf of
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CHRISTENFELD, Commissioners of Elections for Nassau
County,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR RESPONDENTS ROCKEFELLER
AND LOMENZO**

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**BRIEF FOR RESPONDENTS ROCKEFELLER
AND LOMENZO**

Opinions Below

1. Opinion of District Court declaring New York Election Law § 186 unconstitutional, February 10, 1972 (21).*
2. Opinion of Second Circuit reversing District Court and holding New York Election Law § 186 constitutional, April 7, 1972. Reported below at 458 F. 2d 649 (64).
3. Order of Supreme Court granting certiorari, but denying motion for summary reversal, expedited consideration and a stay (80).

Jurisdiction

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Do the complaints present a substantial federal question?
2. Did New York Election Law § 186 unconstitutionally deprive petitioners of the right to vote in the 1972 New York primary when they were eligible to timely do so before the last general election, but failed to so enroll?

The Court of Appeals for the Second Circuit answered "no."

* Unless otherwise indicated, numbers in parentheses refer to pages of the Appendix in this Court.

Statute Involved

New York Election Law § 186

"§ 186. Opening of enrollment box and completion of enrollment

All enrollment blanks contained in the enrollment box shall remain in such box and the box shall not be opened nor shall any of the blanks be removed therefrom until the Tuesday following the day of general election in that year. Such box shall then be opened by the board of elections and the blanks contained therein shall be removed therefrom by the board, and the names of the party designated by each voter under such declaration provided such party continues to be a party, as defined in this law shall be entered by the board, opposite the name of such voter in the appropriate column of the two copies of the register containing enrollment numbers for the election district in which such voter resides. The enrollment blanks marked by voters, who enrolled before a central or veterans' absentee registration board shall at the same time be opened by the board of elections and the names of the party designated by each such voter shall likewise be entered by the board, provided such party continues to be a party, as defined in this law. If cross marks are found in more than one of the circles of any enrollment blank, the voter who used the enrollment blank thus deficient shall not be deemed to be enrolled, and words indicating the reason why such enrollment is not transcribed shall be entered opposite the name of such voter in such copies of the register in the column reserved for the entry of party enrollments. When all of the enrollments shall be transcribed from the blanks to the register, the board of elections shall make a certificate upon the form printed in such registers to the effect that it has correctly and properly

transcribed the enrollment indicated on the blank of each voter to such registers. Such enrollment shall be complete before the succeeding first of February in each year."

Statement of the Case

These actions were instituted to challenge the constitutionality of New York Election Law § 186 as applied to qualified voters who failed to register as such and enroll in a party on or before the 1971 general election, with the result they could not vote in the next following primary (22, 58).

Rosario—The three named petitioners were newly registered voters who all registered on December 3, 1971 and allegedly enrolled in the Democratic Party. Petitioner Pedro J. Rosario was eighteen years old, the minimum age for voting. The record does not disclose when he attained eighteen. The other two petitioners, William J. Freedman and Karen Lee Gottesman, were over twenty-one and could have effectively registered with a party for the 1972 primary during or prior to the October 1971 general registration. By operation of § 186 they were not enrolled party members for the 1972 primary, since they are commonly considered in New York as "in the box." (See Statute Involved, *supra* p. 3).

Eisner—The sole named petitioner here was a newly registered voter who registered on December 13, 1971 and allegedly enrolled in the Democratic Party. He similarly could have registered effectively with a party for the 1972 primary during the October 1971 general registration or before. By operation of § 186, he was not an enrolled party member for the 1972 primary.

These cases were the outgrowth of a similar case, *Backrow v. Rockefeller*, 71 Civ. 930, Eastern District of New York, three-judge court, September 8, 1971. That case was dismissed as moot since there were no primary contests

for those plaintiffs to vote in. *Bachrow* of course did not reach the merits.

The *Bachrow* attorneys, desirous of continuing the attack on Election Law § 186 and destroying the box, at least as to newly registered voters,* instituted the two instant actions. The complaints initially sought both a declaratory judgment and an injunction against § 186. On the return of the two orders to show cause to convene a three-judge court, the petitioners dropped the demand for an injunction leaving a request for a declaratory judgment declaring § 186 unconstitutional insofar as it prevented the petitioners from being enrolled in a party at the June 1972 primary.

The petitioners in the two complaints contended that New York's enrollment law unconstitutionally disqualified them and members of their class (although class action relief was not requested) from participating in the primary; and asked for a declaration that § 186 was unconstitutional. The *Eisner* complaint also claimed violation of the Voting Rights Act of 1970.

Proceedings Below

Invoking the jurisdiction of the District Court pursuant to 42 U.S.C. § 1983, petitioners alleged that New York Election Law § 186 was unconstitutional insofar as it prevented them from participating in any 1972 primary elections, since their party enrollments would remain sealed in a box until after the general election of November 1972. Both declaratory judgments and injunctions pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 2201 *et seq.* were sought. The demand for injunctive relief was withdrawn and the District Court granted a declaratory judgment against § 186.

* The *Bachrow* complaint presented the case of an enrolled voter who moved from one county to another and was "in the box", as well as the case of a newly enrolled voter.

On appeal by the State defendants and the Nassau County Board of Elections, the Court of Appeals for the Second Circuit unanimously reversed the District Court. Recognizing that New York had a compelling state interest in preventing party "raiding" and protecting party integrity, the opinion (LUMBARD, C.J.) found § 186 a reasonable regulation of the party primary process which could not be effected by less drastic means. Indeed it was praised as a highly effective part of New York's effort to minimize the possibility of debilitating political practices. The opinion used the high standard of "compelling state interest" in testing § 186. As noted, it met the test (Opinion and ftn. 4, 69). The petitioners sought reargument *in banc* and a stay of judgment in the Court of Appeals. All were denied April 24, 1972.

The petitioners immediately applied to Justice MARSHALL for a stay of the Court of Appeal's judgment, which was granted temporarily April 26, 1972.

On consideration by the full bench, the stay was denied (80) but certiorari was granted May 31, 1972.

Summary of Argument

New York has a compelling state interest in limiting party enrollments and voting in a primary to properly enrolled party members. This is to protect party integrity. This Court has recognized this interest. It has ruled favorably on the law in several cases which presented the constitutionality of Election Law § 186 and the deferring of party enrollment.

While the challenged statute meets the compelling state interest test completely, it is not necessary to use this strict test. The statute involved is an incidental regulation of the electoral process to be tested by the rational basis test. There is no question presented in the instant case of the

fundamental right to vote. However, even applying the stricter standard, § 186 is the least drastic effective means available to achieve party integrity.

Election Law § 186 has a minimal effect on First Amendment rights because of its indirect method of protecting party integrity. It also is completely neutral to any minority or age groups, and does not present a durational residency question since the petitioners never lacked New York residence.

Finally, since the petitioners were eligible to enroll in time to vote in the primary they may very well have waived their rights by not performing a statutory duty.

POINT I

The Supreme Court has previously considered the issue and found no substantial federal question. It also has considered similar statutes and upheld them.

A. The Supreme Court's Prior Consideration

This is not the first time that substantially the same question of the constitutionality of Election Law § 186 was raised in the courts of the State of New York. Almost two years ago, one of the attorneys for the *Rosario* petitioners, Seymour Friedman, Esq., raised the same question as in the instant case for the first time, and was unsuccessful in this Court on an appeal from the New York Court of Appeals. *Addabbo v. O'Rourke and Friedman*, 27 N.Y. 2d 645, 261 N.E. 2d 904 (1970), appeal dismissed *sub nom. Friedman v. O'Rourke*, for want of a substantial federal question, 400 U.S. 884 (1970).^{*} *Friedman*

^{*} The issue of party membership as a requisite for running in a party primary was raised in *Jordan v. Meisser*, 29 N.Y. 2d 661 (1971). This Court dismissed the appeal for want of a substantial federal question, — U.S. —, 92 S. Ct. 947 (Feb. 22, 1972). New York's statutory requirements are the same as for voting in a party primary.

is a decision on the merits, and binding upon this Court. When the Supreme Court declines jurisdiction of an appeal, finding the federal question to lack substantiality, *Zucht v. King*, 260 U.S. 174, 43 S. Ct. 24 (1922), the test is not the same as for certiorari. As the late Mr. Justice Harlan stated:

"... discretion to dispose of an appeal without argument should be exercised more sparingly than where the question is simply whether to review a case or not. The appellant in a case that is not obviously devoid of substance comes to the court as a matter of right, and disposition of such case involves adjudication on the merits with all of its consequences. On certiorari, on the other hand, a case reaches the court only by leave, and, as noted later, a denial of review carries none of the consequences of adjudication." Mr. Justice Harlan, 13 Record of N.Y.C.B.A. 541, 546 (1958).

See also Stern and Gressman, *Supreme Court Practice*, pp. 198 *et seq.* and *Friedman v. State of New York*, 24 N. Y. 2d 528, 538, 249 N.E. 2d 369 (1969), appeal dismissed 397 U.S. 317 (1970).

Since it would appear that the question of § 186 has been adjudicated by this Court so recently, such holding should be deemed dispositive to affirm the judgment of the Court of Appeals.

The Court of Appeals also properly noted the affirmance by the Supreme Court of a lower court decision which upheld a lower federal court finding that Ohio had a compelling state interest in seeking to protect the integrity of all political parties and membership therein. See *Lippitt v. Cipollone*, 404 U.S. 1032, 92 S. Ct. 729 (1972), *infra*, p. 11.

B. The Compelling State Interest

Assuming it were somehow possible to disregard or differentiate the *Friedman* case, *supra*, which it should be noted the Court of Appeals did not rely on, the judgment and opinion below is entirely correct.

The petitioners seek to equate a primary with a general election. However, the cases they cite on primaries deal with racial discrimination or electoral gerrymandering which would make the general election a farce. Thus state action which promotes or allows racial discrimination in the primary is constitutionally forbidden, *Nixon v. Herndon*, 273 U.S. 536, 47 S. Ct. 446 (1927), or likewise, violation of the one-man one-vote rule in state primaries, e.g., *Gray v. Sanders*, 372 U.S. 368, 83 S. Ct. 801 (1963). Of course, the Court can take judicial notice that all these decisions were in one-party states. The fact is that primaries are not the same as general elections and not all those who may vote at a general election may vote at a primary. This is immediately apparent when we recognize that a primary is not constitutionally required as is an election (United States Constitution, Art. IV, Sec. 4) but is purely a creature of statute. *United States v. Gradwell*, 343 U.S. 476, 37 S. Ct. 407 (1917). It is solely a party affair and simply a nominating device on the same level as a caucus or a convention. It is a method for members of a political party to express their preference in the selection of that party's candidates for public office. To insure this New York has limited participation in primaries to party members or enrollees. This is a "closed" primary. Unless the party committee approves, candidates in a primary must also be enrolled in the party; Election Law § 137. This has been upheld as constitutional, *Ingersoll v. Hefferman*, 297 N.Y. 524, 74 N.E. 2d 466 (1947), and does not raise a substantial federal question. *Friedman v. O'Rourke*, *supra*, p. 7. Therefore, New York has a right to be more restrictive in the operation of and in the participation in

primaries than with respect to the right to vote at a general election.

The basic nature of our political party system was at the heart of Judge Lumbard's opinion below. He said (68):

"The political parties in the United States, though broadbased enough so that their members' philosophies often range across the political spectrum, stand as deliberate associations of individuals drawn together to advance certain common aims by nominating and electing candidates who will pursue those aims once in office."

Similar views were expressed in *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 988 (S.D. Ohio, 1968), *affd. and modif.* 393 U.S. 23 (1968):

"We conceive a political party to be an organization of some permanence, consisting of electors who have some basic theories of government . . . Our primary election is an instrument for the functioning and government of parties."

In furtherance of these purposes and the operation of the primary, New York has provided a system for party enrollment which differs from voting registration. Art. 7 of the Election Law, §§ 150-188. While they take place at the same time they differ in purpose. Thus party enrollment qualifies a person, not to vote at the general election, but to participate in party affairs through the primary and the right to run for a nomination of a party office in a party primary; Election Law § 137.

New York has set up a system of deferred-effect party enrollment (with certain exceptions) to achieve important aims. Thus under § 186 all enrollment blanks during a year are placed in a box, the insidious instrument of petitioners' wrath. It is not opened until the Tuesday after the following general election. This has the effect of deferring a

prospective enrollee's participation in the party primary to the next year. There is a rational basis for the use of the box and it fulfills a vital state interest. Besides requiring a statement, § 174 of the Election Law, of general sympathy with the party and an intent to generally support it §§ 186 and 369(3), by deferring the effect of new party enrollments until after the next election, protect the integrity of political parties. This prevents a takeover of a party in the State or a particular locality through a sudden influx of new enrollees by an outside group, who have no sympathy with its long term aims and objectives. See *Alexander v. Todman*, 337 F. 2d 962, 969 (3rd Cir. 1964), cert. denied 380 U.S. 915. Internal party matters should not be the concern of the courts absent fraud.

Election Law § 186 also gives the party an opportunity to scrutinize new enrollees to determine whether they are truly in sympathy with its principles and whether the party enrollment is subject to cancellation pursuant to Election Law § 332(2).

The view that a limitation on freedom of association to preserve "the formation of recognizable, relatively stable political parties with their own leadership, goals and philosophies", see 404 U.S. at 1033, is a legitimate State concern and a compelling state interest and not a matter of conjecture. In *Lippitt v. Cipollone*, 404 U.S. 1032 (1972), this Court affirmed a lower three-judge court in Ohio, 337 F. Supp. 1405, — (N.D. Ohio 1971), on this point. Ohio Rev. Code § 3313.191 provided that "[n]o person shall be a candidate for nomination or election at a party primary if he voted as a member of a different political party at any primary election within the next preceding four calendar years." Other provisions attacked required those working for primary candidates or signing their nominating petitions to be members of the party in which nomination is sought *id.*,

§ 3513.05. The appellant had voted as a Republican in the 1970 primary and later sought the nomination of a minority party. The District Court held, and this Court affirmed, there was no violation of any constitutionally protected rights:

"The compelling State interest the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and membership therein. These Ohio statutes seek to prevent 'raiding' of one party by members of another party and to preclude candidates from '... altering their political party affiliations for opportunistic reasons.' *State ex rel. Bible v. Board of Elections*, 22 O.S. 2d 57 (1970). Protection of party membership uniformly applied to all parties cannot be characterized as 'invidious discrimination' as defined in *Williams v. Rhodes*, 393 U.S. 23 (1968)]." 337 F. Supp. 1405, 1406 (N.D. Ohio 1971).

New York Election Law § 186 is a much more limited restriction on participation in the political or primary process. Candidates and voters in primaries must meet the same requirements. It also has the same legitimate purpose of preserving party integrity. The reversed District Court judgment would have allowed party switches without limit and, in effect, substituted an "open" primary for a statutorily required "closed" primary.

The maintenance of party integrity is particularly important in view of the fact that New York recognizes not only two major parties, Republican and Democratic, but also two "third parties", Conservative and Liberal. Election Law § 2, subd. 4. The latter two are particularly susceptible to takeovers, as was noted by the Court of Appeals (68, fn. 3). The history of our State shows that § 186 allows third parties to flower without fear of a sudden influx of major party adherents who would destroy them and then return to the two-party system. In *Matter of*

Zuckman v. Donahue, 274 App. Div. 216, 80 N.Y.S. 2d 698 (3rd Dept. 1948), aff'd 298 N.Y. 627 (1948), an action was brought under § 332, subd. 2 of the Election Law to cancel enrollments in the former American Labor Party. The court upheld most of the cancellations, and said the "legislative pattern is clearly designed to safeguard the integrity of minor parties and to prevent raids thereon by those out of sympathy with their principles and motives". Forcefully the court expressed the following vital concern of the State, 274 App. Div. at 218:

"Enrollment and attempted seizure of party machinery for the purpose of advancing the fortunes of another political party will not be tolerated."

While not so important to the major parties, the "box" and deferred enrollment give third parties an opportunity to protect their integrity under § 332, subd. 2. Furthermore, persons wishing to change enrollments or join parties for immediate ulterior motives are less likely to do so since before the general election they tend to identify with the party they will vote for (see Opinion, 70). This is not to say that petitioners have such a motive but the existence of persons who wish to use the enrollment and primary process for ulterior motives, *Zuckman v. Donahue*, *supra*, gives a rational basis for use of the "box". This is a reasonable regulation of the primary process and a compelling state interest. *Lippitt v. Cipollone*, *supra*.^{*} The fact that petitioners alleged they did not wish to change their enrollments does not detract from the force of the above.

^{*} *Lippitt* also upheld a requirement that a person seeking to change party affiliation execute an affidavit affirming that he voted for a majority of the candidates of the party with which he seeks affiliation at the last general election. Ohio Rev. Code § 3513.19. Of course without violating the secrecy of the ballot box this could not be verified. Judge Lumbard in *Rosario* noted New York need not choose ineffective means (72) such as the Ohio affidavit represents.

Non-registrants are typically a group open to organizing by persons who wish to raid a party. Certainly § 186 does not completely prevent takeovers but it reduces the likelihood substantially, placing such tactics in the context of a contest between party members and not a "raid" by party-switchers or organized independents.

Thus New York has a constitutionally valid interest in the protection of party integrity, and that includes all parties. *Ray v. Blair*, 343 U.S. 214, 72 S. Ct. 654 (1952); *Alexander v. Todman*, *supra*. The former case at pp. 225-227 shows that *United States v. Classic*, 313 U.S. 299, 61 S. Ct. 1031 (1941) and *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757 (1944), both relied on by the reversed District Court, are not to be mechanically applied in primary cases.

In addition, the provision for transfers and special enrollments, Election Law § 187, generally for those who are first entering the electoral process, enables a substantial portion of those who have not had a prior opportunity to take part in New York's party system, to do so.* Thus, first time voters, members of the armed forces, newly-arrived residents and persons ill at the last enrollment period all can obtain special enrollments up to 30 days before the primary. § 187, subd. 2a-g. These groups are less likely to have ulterior motives or to be "ringers". That petitioners may not be able to effectively enroll can be admitted. Even in cases involving the electoral process—

"It is true that this Court has firmly established the principle that the Equal Protection Clause does not make every minor difference in the application of laws to different groups a violation of our Constitution." *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5 (1968).

* The Court of Appeals' opinion (72, fn. 5) recognized § 187 as an indication that New York is not opposed to later enrollment per se.

Only "invidious" distinctions are violations, *Williams v. Rhodes*, at 30. Election Law § 186, as a regulation of the party system holding a vital state interest, should be beyond challenge. *Lippitt v. Cipollone*, *supra*; *Kramer v. Union Free School District*, 395 U.S. 621, 625, 89 S. Ct. 1886 (1969); *Carrington v. Rash*, 380 U.S. 89, 91, 85 S. Ct. 775 (1966); *MacDougall v. Green*, 335 U.S. 281, 69 S. Ct. 1 (1948). As this Court said in *Bullock v. Carter*, 405 U.S. 134, 143, 92 S. Ct. 849 (1972):

"Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review."

It is important to note that New York did not prevent the petitioners from effectively enrolling in a party. They had the opportunity and statutory right to do so effectively before the general election of November 1971 and thus vote in the next primary.

POINT II

It is entirely proper to apply the traditional "rational basis" test to § 186.

While we have demonstrated that there is a compelling state interest present, and indeed, contrary to petitioners' insinuations, Brief for Petitioners, p. 24, the Court of Appeals applied this test (69, fn. 4), it is proper to apply traditional equal protection standards to petitioners' claims. In *McDonald v. Board of Election Comm. of Chicago*, 394 U.S. 802, 89 S. Ct. 1404 (1969), this Court unanimously rejected the argument that the "compelling state interest" test applied to determine the right of unsentenced jail inmates to receive absentee ballots for a general election. The Court also found no problem under the rational basis test. In so concluding the Court extensively analyzed the two standards of equal protection. This

analysis, found in a voting case, should conclusively demonstrate the inapplicability of the stricter standard of "compelling state interest" to the instant case. At 394 U.S., pp. 807-809, it showed that it was not necessary to use the extreme test of "compelling state interest":

"Such an exacting approach is not necessary here however, for two readily apparent reasons. *First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote.* It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots. Faced as we are with a constitutional question, we cannot lightly assume, with nothing in the record to support such an assumption that Illinois has in fact precluded appellants from voting." (Emphasis supplied)

The opinion then explained and applied the traditional "rational basis" approach:

"We are then left with the more traditional standards for evaluating appellants' equal protection claims. Though the wide leeway allowed the States by the Fourteenth Amendment to enact legislation that appears to affect similarly situated people differently and the presumption of statutory validity that adheres thereto, admits of no settled formula, some basic guidelines have been firmly fixed. The distinctions drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal. . . . and a legislature need not run the risk of losing an entire remedial scheme simply because

it failed, through inadvertance or otherwise, to cover every evil that might conceivably have been attacked."

It is apparent that New York's statutory scheme does not effect petitioners' *fundamental* right to vote. None of the petitioners will be unable to vote in the general 1972 election. Further, New York's exceptions by special enrollment need not concern us. Election Law §187. A statute cannot cover every contingency that might conceivably arise. New York has a rational party enrollment statute designed to achieve certain aims. It has also, as noted, carved out special exceptions.

The decision in the eighteen-year old voters case, *Oregon v. Mitchell*, 400 U.S. 112, 91 S. Ct. 260 (1970), is strong authority for the view that the Equal Protection Clause of the Fourteenth Amendment was never intended to have any reference to voting qualifications. See 400 U.S. at p. 124. At 125-126 Justice Black in his opinion said:

"It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States. . . . And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-Fourth Amendments superfluous."

And at 127:

"The Fourteenth Amendment was surely not intended to make every discrimination between groups of people a constitutional denial of equal protection."

Justice Harlan's views at 400 U.S., 152-215 are even stronger. In a thorough historical exposition the late Justice shows that the framers of the Equal Protection Clause

never intended to apply it to voting in state and local elections. Five of the Justices concluded that Congress did not have the power under the Fourteenth Amendment enforcement provision to control voter age in state and local elections. Therefore it follows that a claim of abridgment of the franchise in a state and local election should not be allowed without any further allegations as to race, wealth or age. In the last category, age, § 186 is completely neutral, contrary to petitioners' claims. (See Point IV, *infra*, p. 27.)

Certainly, a party primary, as in the instant case, does not fall within the "compelling state interest" test. It traditionally has been a matter of solely state concern. It is fair to say that in an area to which "equal protection has doubtful application, the "compelling interest" test has no place. This Court has affirmed the state's right to run its own political process in *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970 (1971). The Court should now take this opportunity to state the right of New York to set up a rational system of party enrollments as one of the powers reserved to the State under the Tenth Amendment.*

A number of recent cases support the conclusion that the compelling state interest test has no application to cases involving regulations of the electoral process traditionally within a state's cognizance, such as age, residence and absentee ballots. See *Gaunt v. Brown*, 341 F. Supp. 1187 (S. D. Ohio, 1972); *Goosby v. Osser*, 452 F. 2d 39 (3rd Cir. 1971). Regulations setting forth the mechanics of controlling the exercise of the franchise, such as § 186 does with the instant petitioners, are measured by the reasonable basis test. *Goosby* at 40.

* "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are preserved to the States respectively, or to the people." U. S. Constitution, Amend. X.

In a similar vein it was said in *Fidell v. Board of Elections*, 343 F. Supp. 913 (three-judge court, E.D.N.Y., 1972):

"We hold that the State of New York has demonstrated a rational basis for failing to provide for absentee balloting in primary elections, and that the existence of such a rational basis is a sufficient ground for dismissing the present complaint. As the Supreme Court said in *Bullock v. Carter*, 405 U.S. 134, 143 (1972), 'Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.' The cases applying such stringent standards as a compelling state interest and striking down state practices have involved exclusion from the ballot of a class of voters on grounds far different from those presented in the present case."

Blind application of the "compelling state interest" test would mean that state codes regulating the electoral process would fall whenever a litigant shows he is prevented from voting for whatever reason. Cf. *Oregon v. Mitchell*, *supra*, 400 U.S. at 294, 91 S. Ct. at 349 (1970, Stewart, J.); *Dunn v. Blumstein*, 405 U.S. 330, 31 L. Ed. 2d 274, 296 (1972, dissent of BURGER, C.J.). In the instant case, New York has a compelling state interest and can use efficient means to achieve that end.

Perhaps this is the proper point to note the dissenting view of the compelling state interest test in *Pontikes v. Kusper*, — F. Supp. — (N. D. Ill., 3/9/72), as to what must be demonstrated on the Illinois-23 month restriction on switching parties:

"What must also be kept in mind is that voting rights are not absolute and that there is a degree of constitutional infringement short of invidiousness that is permissible so long as the infringement is compelled by a state interest and affects the rights of the voters as little as practicable under the circumstances."

It also noted the temporary nature of the restriction and alternate electoral routes. New York allows an alternate by allowing enrollment before the preceding general election on an unrestricted basis.

The courts in the limited number of sister-states that have considered provisions similar to § 186 have all upheld them. Thus *State v. Felton*, 77 Ohio St. 554, 84 N.E. 85, 89 (1908) upheld a requirement that a voter in a primary must have voted with the political party at the last election. It is not unreasonable to require some prior test of partisanship for eligibility. In *Glenn v. Gnan*, 251 Ky. 3, 64 S.W. 2d 168, 172 (1933) it was said:

"If a voter changes his party affiliations by reregistering following a general election and before the succeeding one, and thereby qualified himself to vote in that primary, it would open the door to the grossest frauds and most extensive abuses resulting in making it possible for a sufficient number of the members of one party to participate in the primary election of the opposing party and to dictate its nominees to be voted for at the following general election, and which result it cannot be contemplated the Legislature intended."

Clearly new registrants are in the same category. And if constitutionally we cannot prevent a new enrollment from taking immediate effect, as petitioners contend, we could not prevent a change of enrollment. This certainly was the effect of the District Court's declaratory judgment.

The same court as in *Glenn* approved the use of a "suspended file" in *Board of Registration Commissioners v. Campbell*, 251 Ky. 597, 65 S.W. 2d 713, 719 (1933).

In *Hennegan v. Geartner*, 186 Md. 551, 47 A. 2d 393 (1946), the state Court of Appeals upheld a statute prohibiting a voter from changing his registration within six months of a primary as against a claim of deprivation of equal protection. The evil of unscrupulous electors hold-

ing themselves out to vote with any party was the evil sought to be avoided. New York also has a vital interest in avoiding this situation.

New York cannot and does not desire to prevent all political shifts, but some curb on violent changes within our traditional parties is vital. It is conjectural to assume, as did the District Court, that there are less drastic means available to achieve the desired end. The availability of penal sanctions is helpful but the delay inherent in the consideration of criminal matters makes the legislative desire to use "the box" a proper exercise of its discretion. See quote from *McDonald v. Board of Election Comm. of Chicago*, 394 U.S. 802, *supra*, pp. 15-17.

POINT III

Election Law § 186 does not unduly burden the exercise of any First Amendment rights.

In finding that the enrollment box system of Election Law § 186 violates rights guaranteed by the First Amendment, the District Court's opinion completely overlooked the case of *Lippitt v. Cipollone*, *supra*, 404 U.S. 1032. Fortunately the Court of Appeals rectified this error. It would seem obvious that if the four year waiting period approved in *Lippitt* does not violate the right of political expression, then the much less severe limitation or "waiting period" contained in § 186 also does not. The right to run for public office involved in *Lippitt* is as fundamental and relevant to free expression as the right to enroll and vote in a party primary.

The *Lippitt* case already has been shown, *supra*, Point I, to approve the compelling state interest test advanced by § 186. "Balancing" or "less drastic means", mentioned by the District Court, are not appropriate. The challenge procedures and criminal sanction, the former being cited in the District Court's opinion (36), are really not "less drastic". Regular recourse to criminal sanctions and court

challenge procedures will, of necessity, in this area of primary voting, have a much more chilling effect on the exercise of First Amendment rights than § 186. Certainly § 186 does not prevent any citizen from speaking out on the issues of the day or affiliating in practice with a political party or group. The limited delay in the effective date of enrollment only protects the stability of political parties, a compelling state interest, and does it, in our view and in the opinion of the Court of Appeals, in a reasonable manner. It said "section 186 is carefully designed to infringe minimally on First and Fourteenth Amendment rights. The statute works indirectly to its end of having only voters in general sympathy with the party vote in that party's primary" (70).

We invite the Court's attention to *Nagler v. Stiles*, — F. Supp. — (D.N.J., May 26, 1972), which struck down a two year restriction on party-switches.* However, *Nagler* noted the New York statute's minimal infringement on constitutional rights. In New York there is no excessively long commitment to a party by voting in its primary. Requiring the voter to choose a party prior to the preceding general election simply forces a voter who wishes to engage in "raiding" to recognize his inconsistency. *Nagler, supra*. This applies to the previously non-affiliated or unregistered voter. If not enrolled when eligible, he can join a party to advance an individual's cause for ulterior motives, while fully intending before the next general election to switch party allegiance, as allowed under § 186, to another party and to vote for the latter's candidates. These debilitating tactics were alluded to in the dissent in *Pontikes v. Kusper, supra*, as follows:

"We should be equally remiss if we were not cognizant of the fact that party allegiances are powerful and can

* This is similar to the *Pontikes* case.

quite easily lead to nefarious inter-party raiding absent any restrictions."

Failure to enroll in a party, as did the petitioners, is as much a political statement of belief as enrolling in a party.

The cases petitioners cite, such as *Pontikes v. Kusper*, *supra*, — F. Supp. — (N.D. Ill., March 9, 1972), *Nagler v. Stiles*, *supra*, — F. Supp. — (D. N.J., May 26, 1972) and *Gordon v. Executive Committee of the Democratic Party of Charleston*, 335 F. Supp. 166 (D. S.C. 1971), are all inapposite. Section 186 exacts no loss of vote if a person switches party allegiance or seeks to change from independent to party status. If the voter changes his enrollment before the preceding general election he votes in the primary of his choice the following year. No one is locked into an unwanted political affiliation. Petitioners' argument (Br. p. 26) that qualified voters should be able to change party allegiance to reflect changes in political climate during the primary campaign runs counter to decisions which see our political parties as voluntary associations of individuals. See *Socialist Labor Party v. Rhodes*, *supra*, and the instant case. Opening party primaries to voters not in sympathy with the party's program and common aims would ultimately lead to its destruction as a viable vehicle for political expression. As the Second Circuit said (68):

"In such circumstances, the raided party would be hard pressed to put forth the candidates its members deemed most satisfactory. In the end, the chief loser would be the public."

Actually the participation of such independent voters or untimely-enrolled voters raises a fundamental danger to the accepted definition of a political party found in the Court of Appeals opinion and in *Socialist Labor Party v. Rhodes*, *supra*. The independent voter may have no real sympathy with the party, as witnessed by his prior failure

to enroll when eligible, but may desire to advance the election of a particular candidate in the primary. Their interest is in the "personality of an individual", not the "basic theories of government" possessed by the true party members. 290 F. Supp. at 988. To protect party integrity New York need not allow such voters to participate in a party primary. Their right to vote finds expression at the general election, not the primary. The petitioners desire to make the primary a general pre-election. This is not its function. If it were, the party system, as we know it in New York, with four recognized parties, would be in serious danger of destruction.

The two recognized minority parties of New York, Conservative and Liberal, have limited enrollments. Were independents to vote in their primaries, they could easily overwhelm those dedicated enrollees who year in and year out form the backbone of these minority parties but are joined at the general election by innumerable other voters who seek an alternative to the major parties.

The massive participation by non-Democrats in the Spring 1972 primaries by means of party-switching is a matter of record in our press. Indeed it led to the adoption at the Democratic National Convention in Miami in July 1972 of a rule requiring closed primaries in the future, with past registration as a Democrat as a requisite for participation. In other words the Democratic Party recognized the necessity of the end § 186 seeks to achieve. Primaries must be limited to party members, and some means must exist to eliminate independents and members of other parties from influencing the party's choice of its candidate.

It is of interest to note that Election Law § 186 did not in any way prevent Mayor John Lindsay of New York City from changing party enrollment to vie for the 1972 Democratic presidential nomination. While his change of enrollment went into the box under § 186 for a limited period,

the statute did not inhibit him, as all the press reports showed, from immediately expressing his views on Democratic Party matters. Honest, trustworthy citizens do not find § 186 a limitation on their freedom of political expression, or in switching party loyalties or affiliations. However, those who have ulterior motives and seek to subvert or destroy the stability of our political party system will find § 186 an obstacle. *Zuckman v. Donahue, supra*, p. 13. It was meant to be and is a constitutional exercise of discretion by our Legislature. See *Lippitt, supra*, and *McDonald v. Board of Election Comm., supra*.

The alleged infringement on petitioners' right of association is amply justified by the fact that newly-enrolled voters can pose a substantial threat of organized large-scale "raiding". In their papers, the petitioners alleged there were hundreds of thousands of persons similarly situated. In this day and age there are many groups, already well organized, with political aims, which, without the deterrent of § 186, could easily engage in raids or short-notice takeovers of established political organizations.

POINT IV

§ 186 is the least drastic means to achieve a compelling state interest, is not a durational residency requirement and is totally nondiscriminatory.

A. The Least Drastic Means

Petitioners argue that New York already has other means to prevent raiding—namely, Election Law § 332. However the Court of Appeals noted (71-72) that in the face of large scale raiding that section would leave party officials virtually impotent. Section 186 is effective but that in no way means it is unconstitutional. Its broad deterrent effect was praised, not condemned by the Court of Appeals.

We have already noted in Point II that regular recourse to criminal sanctions and court challenge procedures, suggested by petitioners, will in the end be more drastic and regularly involve court inquiries into the voters' minds. Section 186 avoids this in most instances, preventing the widespread specter of state-enforced thought control.

B. The Lack of a Durational Residence Issue

The petitioners continue to claim that § 186 is a durational residency requirement and would apply *Dunn v. Blumstein, supra*, 405 U.S. 330, 31 L. Ed. 2d 274 (1972). Simply stated, § 186 cannot be such a requirement because petitioners never lacked residency.* They only failed to avail themselves of the opportunity to timely enroll. Therefore, as to petitioners, there is no issue as to any constitutionally protected right to travel. Indeed the petitioners never raised the issue below and it was not discussed in the several opinions. Where an issue is neither raised before nor considered by the Court of Appeals, this Court will ordinarily not consider it. *Adickes v. Kress & Co.*, 398 U.S. 144, 147 (ftn. 1), 90 S. Ct. 1598 (1970).

Furthermore, this claim of right to travel can only be presented by a possible litigant who is a newly established New York resident or who has crossed county lines within New York since the last general election; the interests of such a class would not be adequately represented by the instant petitioners because, except for subd. 6 to Election Law § 187 (special enrollments), anyone in such a class would be entitled to enrollment up to 30 days before the primary. See Election Law § 187, subd. 2, which allows special enrollments for those who lacked residency requirements for voting at the time of the last general election. Subdivision 6 limits this to the same county as a per-

* Before the *Dunn* decision this claim rested on 42 U.S.C. § 1973aa-1.

son resided in at the time of the last general election. The petitioners do not attack subd. 6 simply because its elimination would not assist them. To this extent the interests of petitioners and new residents or county-movers are antagonistic. Not being either of the latter, petitioners cannot present their claim which, it might be noted, was present in the *Bachrow* case, *supra*.

Section 186 applies across the board to all persons who failed to enroll in a party at the time of the preceding general election. This is in contrast to the *Dunn* situation where only the new resident was prevented from voting in a primary because of the lack of sufficient residence before the election.

C. The Non-discriminatory Nature of § 186

Petitioners' discussion of "grandfather clauses" is inappropriate. Section 186 does not discriminate against 18-21 year olds or racial minorities. On the contrary, it is completely neutral. It has been around much longer than the Twenty-sixth Amendment and clearly was not passed to impair the newly enfranchised's right to vote. So, too, as to racial minorities; and there is no allegation that petitioners are representatives of the class. Even the favorable (to petitioners) decision in the District Court did not think these arguments worthy of mention or discussion. Petitioners have engaged in unsupported speculations, which have no basis in the record. Why persons fail to register or enroll when eligible is always a mystery and to a large measure rests on the lethargy of such individuals, or the instant petitioners, in any particular case. See *Foutham v. McKeithen*, 336 F. Supp. 153, 162 (E.D. La. 1971) app. pdg. 92 S. Ct. 999, 31 L. Ed 2d 279.

The speculative numbers game engaged in by petitioners who claim 950,000 in the 18-21 category at the passage of the Twenty-Sixth Amendment (Brief for Pet. 45) is not relevant to the underlying constitutional issues. The peti-

tioners ignore the extent to which such factors as motivation, disinterest or inertia may be responsible not only for the non-registration of eligibles in the 18-21 age bracket, but in all other age categories. In the former connection we note an article "Teen Vote Registration Lags", New York Post, May 12, 1972, p. 1. The gist of the item is that in spite of massive efforts, registration of teenagers for the primary is lagging far behind expectation.

This situation continues as we get closer to the November 1972 election. See "18-20 Group Lags on Registering to Vote," New York Times, August 13, 1972. Apparently it is not § 186, but apathy, that prevents enrollment in this age group.

Also, as the Court of Appeal noted, "New York does allow post-general election enrollment in certain cases. Section 187 of the Election Law allows late enrollment if, for example, the enrollee came of age after the last general election or if he was ill during the enrollment period. The import of § 187 is that New York is not opposed to later enrollment per se" (72, fn. 5). Thus thousands of persons who attained 18 since the last general election of, 1971 could and did enroll to vote in the June 1972 primary but petitioners ignore this provision.

POINT V

The petitioners have waived their claimed constitutional rights, if any.

Assuming, without conceding, that the petitioners have some constitutional right to enroll in a party and participate in its primary without extended delay in enrollment, the record fails to show that Election Law § 186 prevented them from enrolling in time for the 1972 primary. As is stated in paragraph "6" of the *Rosario* complaint, "[e]ach of these plaintiffs could have registered and enrolled on

or before October 2nd, 1971, the last date of registration for the November 1971 elections. They did not do so." The petitioner in *Eisner* also could have enrolled then (see paragraph "5" of the complaint). As was said in *Matter of Vitale v. Cristenfeld*, New York Law Journal, August 30, 1971, p. 14, col. 3 (Sup. Ct. Nassau Co., 1971); aff'd 37 A.D. 2d 775 (2nd Dept. 1971):

"The petitioner's inability to vote in the [primary] has not been caused by the provision of the Election Law which he assails but by his admitted failure to take timely steps to effect his enrollment."

As in the instant case, the petition was silent as to any reason for the failure to timely enroll. The inference is warranted that petitioners knew they could enroll at the proper time but for undisclosed reasons elected not to do so. To quote *Matter of Davis v. Board of Elections*, 5 N.Y. 2d 66, 69, 153 N.E. 2d 879 (1958), "[t]he franchise conferred by the Constitution gives rise not only to a right but also a duty, and this statute [Election Law § 138] merely attaches reasonable consequences to the nonperformance of that duty in the interest of administrative necessity." In the instant situation we have the compelling state interest of protecting the integrity of political parties.

It should be noted that in any case, "even the most basic constitutional rights may be waived." *Redgate v. Boston Redevelopment Authority*, 311 F. Supp. 43, 47 (D. Mass., three-judge court, 1969). To the extent the instant petitioners failed to timely enroll, in spite of substantial publicity, they should be deemed to have waived their constitutional rights, if any.

The failure of the petitioners to comply with the law also raises questions of justiciability. *Golden v. Zwickler*, 394 U.S. 103 (1969).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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Respectfully submitted,

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